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ENVIRONMENTAL PROTECTION AGENCY
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In the Matter of:)	Docket No. FIFRA-09-2009-0013
)	
Bug Bam Products, LLC)	RESPONSE TO RESPONDENT'S
)	RENEWED MOTION TO DISMISS
)	
Respondent)	
)	
)	

The United States Environmental Protection Agency Region IX ("EPA" or "Complainant") filed the initial complaint against Bug Bam Products, LLC ("Bug Bam") in the above referenced matter on September 18, 2009 ("Complaint"). In the Complaint, EPA alleged that Bug Bam violated section 12(a)(1)(A) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") in three separate transactions by distributing or selling three unregistered pesticides. Bug Bam filed its Answer to the Complaint on October 16, 2009. On November 19, 2009, after the Presiding Officer granting its motion to do so, Complainant filed a First Amended

Complaint adding a second respondent, Flash Sales Inc. (“Flash Sales”), and increasing the penalty, among other changes.

On or about December 9, 2009, Bug Bam filed a Motion to Dismiss the initial Complaint. Complainant filed its Response to the Motion to Dismiss on or about December 18, 2009. On or about March 12, 2010, Bug Bam filed a Renewed Motion to Dismiss, which both renewed the claims in its initial Motion to Dismiss and raised new purported grounds for dismissal. Complainant hereby renews its original Response to the Motion to Dismiss and responds to the new grounds for dismissal raised by Bug Bam. Therefore, for the following reasons, Bug Bam’s Amended Motion to Dismiss must fail:

I. Applicable Legal Standards

A. Motion to Dismiss

Pursuant to the standards set forth at 40 C.F.R. § 22.20(a) for motions to dismiss, the Presiding Officer may only dismiss a complaint “on the basis of failure to establish a *prima facie* case or other grounds which show no right to relief on the part of the complainant.” However, the Consolidated Rules of Practice (“CROP”) at 40 C.F.R. Part 22 do not contain a specific legal standard by which to evaluate a motion to dismiss. When the CROP is silent, guidance may be found in other statements of the law, such as the Federal Rules of Civil Procedure (“FRCP”). In the Matter of S&S Landfill, Inc., CAA-III-002 (EPA ALJ Sept. 22, 1994). In this case, the Presiding Officer can look to the standard under Rule 12(b)(6) of the Federal Rules of Civil Procedure as “guidance.” In the Matter of Agronics, Inc., CWA 6-1631-99, 2003 WL 21480370, (EPA ALJ 2003); In the Matter of Ferry County Noxious Weed Control District, FIFRA-10-2002-0048, 2003 WL 402870, (EPA ALJ 2003).

Under the FRCPs, a movant has a high burden in showing that a motion to dismiss is warranted. In general, motions to dismiss are “viewed with disfavor and [are] rarely granted.” Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir.1982) (quoting Wright & Miller, Federal Practice & Procedure: Civil § 1357 at 598 (1969)). In fact, the threshold that a complaint must meet to survive a motion to dismiss for failure to state a claim is “exceedingly low.” Ancata v. Prison Heath Serv., Inc., 769 F.2d 700, 703 (11th Cir. 1985) (quoting Quality Foods de Centro America, S.A. v. Latin American Agribusiness Devel., 711 F.2d 989, 995 (11th Cir. 1983)).

More specifically, a motion to dismiss should be denied if the complaint states facts that establish “plausible grounds” for the *prima facie* case alleged. See Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 556 (2007). In other words, “once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.” Twombly, 550 U.S. at 556; see also Conley v. Gibson, 355 U.S. 41, 47 (1957) (“the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.”). Moreover, for purposes of deciding a motion to dismiss, the Presiding Officer must accept the material allegations of the pleading as true and construe the allegations in the light most favorable to the non-movant. See Colle v. Brazos County, 981 F.2d 237, 243 (5th Cir. 1993) (citations omitted).

B. FIFRA Section 12(a)(1)(A)

FIFRA section 12(a)(1)(A), 7 U.S.C. § 136j, makes it “unlawful for any person in any State to distribute or sell to any person any pesticide that is not registered under section 136a of this title” Therefore to establish a *prima facie* case for a violation of FIFRA § 12(a)(1)(A), EPA must allege the following elements:

- 1) Respondent is a “person” as defined by FIFRA § 2(s), 7 U.S.C. § 136(s);
- 2) Respondent has distributed or sold, as defined by FIFRA § 2(gg), 7 U.S.C. § 136(gg),
- 3) A “pesticide” as defined by FIFRA § 2(u), 7 U.S.C. § 136(u); and
- 4) The pesticide is not registered under FIFRA § 136a, 7 U.S.C. § 136a.

The term “distribute or sale” is broadly defined by FIFRA § 2(gg) to mean “to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver.”

II. Argument

In its Amended Motion to Dismiss, Bug Bam makes the following two arguments as to why the Amended Complaint should be dismissed against Bug Bam: (1) Complainant “can prove no set of facts . . . which would entitle [it] to relief” because Bug Bam never engaged in the alleged illegal sales or distributions; and (2) Complainant has only made “conclusionary” allegations that do not pass the test set forth in Twombly for pleadings. However, both of these challenges are without merit.

A. The Complaint Need only Plead the Distribution or Sale of Unregistered Pesticides, Not Prove Them

As a reason to dismiss the Amended Complaint, Bug Bam claims that it never distributed or sold the unregistered pesticides at issue. However, in making this argument, Bug Bam ignores the longstanding and well-established principle that factual allegations in a complaint must be taken as true when considering a motion to dismiss. Colle, 981 F.2d at 243. Therefore, the only question to be resolved regarding Bug Bam’s challenge to the Amended Complaint is whether or not Complainant’s pleadings, if taken as true, allege a *prima facie* case that Bug Bam sold or distributed the unregistered pesticides.

The term to “distribute or sell,” as defined in FIFRA § 2(gg), broadly applies to all levels of commercial activity. The broad scope of this definition is consistent with FIFRA’s ambitious goals to protect the public by establishing a comprehensive pesticide regulatory scheme. *See EPA v. Monsanto Co.*, 467 U.S. 986, 991 (1984). Rather than being merely “suggestive,” as Bug Bam claims, the term to “distribute or sell” is meant to cast a wide net of liability over all commercial activity related to unregistered pesticides.

Contrary to Bug Bam’s claims, the Amended Complaint alleges at least two specific factual allegations, which, if accepted as true, would readily meet Complainant’s *prima facie* pleading requirements. Namely, the Amended Complaint alleges that (1) the “website bugbam.com offered for sale” the three unregistered pesticides “on or about February 25, 2009” (See Amended Complaint 26, 34, 42); and (2) that “Flash Sales sent” the three unregistered pesticides “via mail to Mr. Carpenter after the purchase of the item(s) on the bugbam.com website on or about February 25, 2009” (Amended Complaint 28, 36, 44). Either one of these allegations, if true, establishes Bug Bam’s illegal behavior.

Fatal to the Amended Motion to Dismiss, Bug Bam only challenges one of these factual allegations, namely that Bug Bam “offered for sale” the pesticide products on its website, as discussed below. Bug Bam completely missed the fact that Complainant specifically pled in the Amended Complaint that one of its employees, identified as Mr. Frank Carpenter, directly purchased the unregistered pesticides directly from Bug Bam through its website. Moreover, Bug Bam made this sale because it was processed through its website regardless of whether or not Flash Sales actually mailed or “distributed” the unregistered pesticide products. By not challenging this second ground for establishing the “distribution or sale” of the unregistered pesticide products, Bug Bam’s Motion is flawed *ab initio*.

Additionally, Bug Bam misapprehends the applicable law when it claims that it did not “offer for sale” its pesticide products. Through a 1989 interpretative rule, which underwent notice-and-comment rulemaking, EPA interpreted the term “offer for sale” to include “*any advertisements in any advertising medium* to which pesticide users or the general public have access.” See 40 C.F.R. 168.22(a) (emphasis added). By advertising about the availability, price, nature, and ability to purchase its unregistered pesticide products on its website, an “advertising medium” to which the “general public” has access, Bug Bam’s commercial activity fell squarely within the definition of “offer for sale” as set forth in this interpretative rule. Bug Bam entirely failed to address in its Amended Motion to Dismiss why its advertising activities were not subject to the interpretative rule or why the interpretative rule should not apply in this situation.

Good policy also dictates that online advertising of unregistered pesticide should be prohibited.¹ In the preamble for the interpretative rule, EPA stated that “allowing advertising of unregistered pesticides is inconsistent with a statutory scheme which requires that pesticides be registered and that the marketing of these pesticides be based on claims evaluated by EPA in the registration process.” 54 Fed. Reg. 1122-01 (Jan. 11, 1989). Indeed, allowing the unfettered advertising of unregistered pesticides subverts the goals of FIFRA of keeping unregistered pesticide products out of the stream of commerce.

In supporting its claim that it did not “offer for sale” the unregistered pesticide products, Bug Bam only cites one case, In the Matter of TIFA Ltd., 9 E.A.D. 145 (2000). In TIFA, the

¹ In considering whether it is appropriate for online marketers to be advertising unregistered pesticides, it is important to understand the scope of e-commerce in the modern U.S. economy. Indeed, e-commerce accounted for \$3,333 billion in revenue in 2007 and continues to be a growing source of economic activity in the U.S. U.S. Census Bureau, E-Stats (May 28, 2008) available at <http://www.census/estats>. Allowing advertising of unregistered pesticides on the web would greatly confuse the public and may result in a flood of illegal pesticides being advertised to the public.

Environmental Appeals Board (“EAB”) found that a facsimile sent by an employee of a company selling pesticides to a single potential customer was not an “offer for sale” subjecting the respondent to penalties. However, the act of sending a single facsimile to one potential customer is very different from the broad-based advertising performed by Bug Bam. As a result, TIFA is distinguishable from the present case.²

In addition, the EAB, on at least one occasion, has recognized the broad reach of the advertising prohibition. See In The Matter of Sporicidin International, 3 E.A.D. 589, 1991 WL 155255, at *8 (1991). In Sporicidin, the EAB found that the general distribution of a report to hospitals containing claims not approved as part of the registration of an antimicrobial product was illegal under FIFRA. In reaching this conclusion, the EAB recognized that “EPA published a rule confirming that Agency enforcement personnel interpret the prohibition in section 12(a)(1)(B) as extending to ‘advertisements in any medium to which pesticide users or the general public have access.’”³ Id. Given that Bug Bam’s activity of advertising its products on the web to the general public well exceeded the extent of the advertising found to be illegal in Sporicidin, where the respondent simply distributed an unapproved report to only a limited number of hospitals, Sporicidin provides strong support that the EAB would rule in Complainant’s favor on this issue.

² Also of importance, even though the EAB ruling in TIFA was issued well after the promulgation of the interpretative rule on “advertising”, the EAB in that case did not address the reach of the interpretative rule. This strongly suggests that the EAB did not view the activity at issue in TIFA to be “advertising,” further distinguishing it from the present case.

³ FIFRA section 12(a)(1)(B), which makes it illegal to “distribute or sell” a pesticide product with claims different than those approved as part of its registration, parallels section 12(a)(1)(A)’s prohibition on the “distribution or sale” of unregistered pesticide products, and the term “distribution of sale” is similarly defined in both provisions.

B. Complainant's Factual Allegation in the Amended Complaint Are Not Conclusionary

Bug Bam also argues that Complainant's factual pleadings are "conclusionary" because they do not include the "statement of circumstances, occurrences, and events in support of the claim presented." To bolster its argument, Bug Bam's erroneously alleges that "no facts have been alleged [in the Amended Complaint] to support" the claim that Respondent sold or distributed products. Amended Motion to Dismiss, at 4-5. These assertions by Bug Bam are baffling. As discussed above, Complainant specifically alleged in the Amended Complaint that the "website bugbam.com offered for sale" the three unregistered pesticides "on or about February 25, 2009" and that "Flash Sales sent" the three unregistered pesticides "via mail to Mr. Carpenter after the purchase of the item on the bugbam.com website on or about February 25, 2009." These are factual allegations containing specific acts and dates that, if true, would undeniably establish Bug Bam's liability for "distributing or selling" unregistered pesticide products, and thereby easily establish "plausible grounds" for the alleged violations of FIFRA § 12(a)(1)(A). See Twombly, 550 U.S. at 556. Moreover, unlike in the failed pleadings in Twombly, these factual allegations, if true, can lead to no other conclusion than that Bug Bam violated FIFRA, as there is no "parallel" interpretation of these facts leading to permissible behavior in regard to the unregistered pesticides. Id. at 554.

The only failing that Bug Bam specifically points out in regard to Complainant's factual pleadings is the lack of allegations pertaining to "invoicing, a sales receipt, and origin of the shipment." Amended Motion to Dismiss, at 4. These claims are also misguided. In the case of "offer for sale," since the mere advertising of the unregistered product makes the act illegal, there would be no invoices, sales receipt, or origin of shipment, so adding this as a factual

allegation would add nothing to the pleadings. In regard to the factual allegation that Bug Bam directly sold its product to an EPA employee, the Amended Complainant alleges that transaction in sufficient detail. While an invoice or sales receipt may be necessary at hearing to evidence the occurrence of the “sale,” specific reference to the existence of such an invoice or sales receipt also adds nothing to the pleadings. Indeed, since it is the “distribution or sale” of an unregistered pesticide which makes an act illegal under of FIFRA, the existence or non-existence of an invoice or receipt is not a core element creating liability, and hence would not need to be specifically pled.

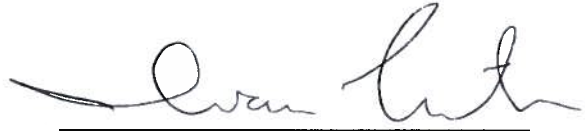
Finally, Bug Bam claims that “[t]he Presiding Officer is not required to accept Complainant’s use of suggestive terms or the *de facto* presence of a website as sufficient basis to withstand a Motion to Dismiss” and that allowing the pleadings to stand will “bring the full force of the Federal government down upon the Respondent for any number of minimal infractions.” Amended Motion to Dismiss at 5. However, Complainant has identified discrete transactions in its pleading which “plausibly” lead to the violations, which is all that is required of it. Moreover, if Bug Bam does not believe that it engaged in these alleged illegal activities, then it has the right to a hearing on the matter to dispute Complainant’s allegations. By engaging in the hearing process, Bug Bam will have ample opportunity to present its case that it should avoid the impact of “the full force of the Federal government . . . for a minimal infraction[.]”

III. Conclusion

For the reasons set forth herein, the Complainant seeks the Presiding Officer to deny Respondent's Amended Motion to Dismiss.

Respectfully Submitted,

Dated: 3/25/10

A handwritten signature in cursive script, appearing to read "Ivan Lieben", written over a horizontal line.

Ivan Lieben
Assistant Regional Counsel
U.S. EPA, Region IX

In the Matter of Bug Bam Products, LLC, and Flash Sales, Inc.
Docket No. FIFRA-09-2009-0013

CERTIFICATE OF SERVICE


I hereby certify that the original of the foregoing Respondent to Respondent's Renewed Motion to Dismiss was filed with the Regional Hearing Clerk, U.S. EPA, Region IX, and that a copy was faxed and sent by Pouch Mail and first class certified return receipt mail, respectively, to:

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